

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Siteone Landscape Supply, LLC, . Docket #CV-23-2084 (GRB) (ST)
Plaintiff, .
v. . United States Courthouse
Nicholas Giordano, et al., . Central Islip, New York
Defendants. . February 27, 2024
..... 3:46 p.m.

TRANSCRIPT OF PRE-MOTION CONFERENCE
BEFORE THE HONORABLE GARY R. BROWN
UNITED STATES DISTRICT COURT JUDGE

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1 (Proceeding in progress)

2 THE CLERK: -- 3-2084, Siteone Landscape Supply, LLC
3 vs. Giordano, et al. Counsel, please state your appearance
4 for the record. Plaintiff goes first.

5 MR. MULRY: For the Plaintiff, Kevin Mulry from
6 Farrell Fritz. Good morning, Your Honor. Good afternoon,
7 Your Honor.

8 THE COURT: Morning. Good afternoon.

9 MR. MULE: Good afternoon, Your Honor. Michael
10 Mule, Milman Labuda Law Group, along with my partner, Rob
11 Milman, on behalf of Defendants, Dominick Caroleo, The Garden
12 Department, Corp., 3670 Route 112, LLC, and 9 4th Street, LLC.

13 MS. COHEN: Good afternoon, Your Honor. Julie Cohen
14 from Skadden Arps, on behalf of Defendants Nicholas Giordano,
15 Vic Caroleo, Narrow Way Realty, Ltd., Narrow Way 2, LLC, Group
16 5 Associates, Ltd., Scapes Supply, LLC, and New Way
17 Management, LLC.

18 MR. ZABELL: Good afternoon, Judge. Saul Zabell. I
19 represent the same individuals Ms. Cohen just identified.

20 MR. GIBBS: Good afternoon (indiscern.).

21 THE COURT: (indiscern.)

22 MR. GIBBS: Evan Gibbs.

23 THE COURT: Okay. Go ahead.

24 MR. GIBBS: I'm sorry, Your Honor.

25 THE COURT: (indiscern.)

1 MR. GIBBS: I had trouble getting my phone off of
2 mute, but this is Evan Gibbs, appearing on behalf of
3 Plaintiff, Siteone, and I'm here with my colleague, Dan
4 Gorman, as well.

5 THE COURT: Okay. Anybody else? Sounds like we've
6 got everyone. All right. This is Judge Brown. There's a
7 Pre-Motion Conference we're on for here, and as you know from
8 my rules and the orders establishing this conference, I don't
9 stop anyone from making a Motion. You can make any Motion you
10 like, however, I do reserve the right -- If I think we can
11 resolve this here, to deem the Motion made and resolve it. So
12 feel free to argue anything you want. With that said, I'll
13 hand it off. Who would like to take the lead for the
14 Defendants making (indiscern.) the Motion?

15 MR. MULE: Your Honor, it's Michael Mule. I'd like
16 to begin on behalf of my clients, if I may?

17 THE COURT: Okay.

18 MR. MULE: Okay?

19 THE COURT: Sure.

20 MR. MULE: All right. Great. Your Honor, I
21 represent the Defendants Dominick Caroleo, The Garden
22 Department Corp, 3670 Route 112, and 9 4th Street, LLC. The
23 facts in this case, despite the long Complaint, are really
24 rather simple. Siteone's a multi-national, publicly traded
25 landscape supply company. They acquired one Defendant in this

1 action. That's The Garden Department. In January of 2020,
2 Garden Department had three locations in Long Island they sold
3 for \$30 million. Dom is the sole owner of that corporation,
4 and was at the time, and The Garden Department and Dom
5 individually were required to sign non-competes.

6 They went to work for Siteone thereafter. Vic and Nick
7 Giordano, Co-Defendants, also went to work for Siteone after
8 the acquisition, but they have no non-competes, no agreements
9 individually not to compete with Siteone. Siteone went from a
10 \$3.8 billion mortgage cap when they acquired Garden
11 Department, to today's 7.45 billion. They doubled. In
12 October of 2022, Siteone terminated Don, they terminated Vic.
13 Nick got upset and gets terminated. Nick and Vic have no
14 restrictions. They go into business with each other. Vic has
15 been in the business landscape supply since 1976. He never
16 stopped. Been in this for almost 50 years. Don took over
17 Garden Department in 2005, but Vic always remained in the
18 business. Nick has been in the business for approximately 20
19 years. He ran the stores.

20 These folks all are well-versed in the landscape supply
21 business, have a ton of experience. There's no special sauce
22 in this business. You basically, you buy the supply, the
23 landscape supplies, you sell it for a fair price, you provide
24 good service, there's no secret identity of customers. It's a
25 very simple business model. We submit that the argument by

1 Siteone makes no sense. They basically have sued Don based on
2 conduct of Vic and Nick in opening a competing business, when
3 they're entitled to do so, and they sued Vic and Nick based on
4 non-competes that are in place with Don, and Don's {sic} doing
5 nothing. So they try to overcome this disconnect with
6 conclusory group pleading, and that brings me to the three
7 points I'd like to point out and focus the Court's attention
8 on.

9 Number one is, as an initial matter, the corporate -- as
10 to the corporate Defendants, my clients, 3670 Route 112, 9 4th
11 Street, LLC, and Garden Department, there are, like, no
12 allegations in this Complaint. They allege in paragraphs 10,
13 12 and 13 essentially that those are New York, LLCs, or
14 corporations as the case may be, that Don is the sole owner,
15 and they allege that either -- that the LLC is a party to a
16 Lease, or that Garden Department is a party to the Asset
17 Purchase Agreement. That's the extent of the facts as to the
18 corporate entities. There's simply no cause of action as far
19 as any facts alleged against those entities. And then there
20 are two other things I want to focus the Court's attention on.

21 Number two is, there's a high level problem with the
22 entirety of Siteone's pleading, and that problem is its
23 conclusory group pleading. Their claims are infected. The
24 whole Complaint -- approximately one-third of the allegations
25 are Defendants this, Defendants that. It's a gross

1 oversimplification, does not give any notice to the parties,
2 it's totally impermissible, and so that's a fatal flaw in
3 their Complaint. And then the last point I'd like to focus
4 the Court's attention on is that Siteone has hinged its
5 federal court jurisdiction here on two claims. Defend Trade
6 Secrets Act, and the Computer Fraud Abuse Act. And besides
7 the group pleadings problem, the conclusory pleadings problem
8 that infects all the claims, they simply do not state those
9 claims, and once those claims are gone, this Court could
10 dismiss the whole case, and although they -- it may emphasize
11 supplemental jurisdiction, it's well settled law that federal
12 claims, when eliminated in the early stages of a litigation,
13 the Court should generally decline to exercise pending
14 jurisdiction over remaining state law claims, and that's Klein
15 & Co. Futures vs. Board of Trade, 464 F.3d 255 at 262 (2d Cir.
16 2006).

17 We'll present as much or as little as the Court would
18 like, but I want to get to the two core issues, which are the
19 impermissible group pleading, and the fact that they just
20 failed to state these two federal claims, and that should
21 allow dismissal of the entire Complaint, and they just don't
22 fit any claim in any event. So as to the supplemental flaw,
23 I'll start with what this Court found in its January
24 (indiscern.) 2024 Order at Docket 104. The Court referenced
25 the Plaintiff's opening with (indiscern.) papers, where they

1 stated, "This is a simple case. Siteone purchased Garden
2 Department for 30 plus million, and ask only that Defendants
3 act with good faith, and honor the deal they made, including
4 not competing with Siteone." The Court found that {quote},
5 "This opening salvo is emblematic of the problems with
6 Plaintiff's approach to this Motion. Siteone continually
7 oversimplifies the case, aggregating Defendants into a single
8 unit, even though Plaintiff entered into discreet agreements
9 imposing particular obligations upon various Defendants."

10 For example, while the agreements involve a web of
11 transactions, back when Counsel pleaded (indiscern.) to
12 characterize the acquisition as a comprehensive, indivisible
13 deal, and the Court cites Docket 94(1), describing Defendants
14 allege unfair competition with, {quote}, "The business
15 (indiscern.) from that," lumping all the Defendants together.
16 We submit that the Court's statements in that order applies to
17 Siteone's amended Complaint as well. The overall (indiscern.)
18 with their amended Complaint is that it's just a group
19 pleading. You look at Paragraph 1. It says, "Defendants have
20 engaged in a course of conduct that is shocking to the
21 conscience." Pure conclusion grouped together. Paragraph 2,
22 "Defendants acting in concert stole Siteone computers."
23 Again, conclusions. No factual predicate. Just lump everyone
24 together. The amended Complaint contains statements that are
25 directly contradicted by the documentary evidence that Siteone

1 itself annexes. So for example, Paragraph 58 of the amended
2 Complaint says {quote}, "It has now been determine that the
3 property Don Caroleo purchased is located at 38 Yaphank Middle
4 Island Road," {close quotes} yet they attached the Deed at
5 Docket 1-9, showing Narrow Way 2, LLC as the owner, not Don
6 Caroleo. Paragraph 9 of the amended Complaint alleges that
7 Vic, not Don Caroleo, is a member of Narrow Way 2, LLC.

8 All told, there are 90 allegations approximately, out of
9 256, where they just lump the original Defendants together
10 without differentiation and without factual predicate. As
11 against the Don Defendants, who I'll call but my clients
12 collectively, they make general undifferentiated references to
13 Defendants, and I'll just list the number of Paragraphs. 1,
14 2, 3, 4, 5, 70, 80 --

15 THE COURT: Counsel. Counsel.

16 MR. MULE: -- (indiscern.) --

17 THE COURT: Counsel, that's not helpful. There's a
18 lot of them. I got it.

19 MR. MULE: Okay.

20 THE COURT: Go ahead.

21 MR. MULE: There's a lot. All right. So just to
22 continue. So, you know, Judge, conclusions obviously are not
23 entitled to the assumption of truth, and that's High Falls
24 Brewing, LLC vs. Boston Beer Company. That's 852 F. Supp. 2d
25 306, 321. Conclusions do not constitute plausible allegations

1 as a matter of law, and that's Sumar vs. Brooklyn Hospital
2 Center, 2023 U.S. Dist. LEXIS 222004 (E.D. December 13, 2023).
3 Sumar notes in that case there are allegations -- this was a
4 Title VII claim that the Plaintiff said it was employed by the
5 state, but it didn't assert any facts supporting the
6 employment relationship, so the Court dismissed it because
7 there was no factual predicate, and if you look at the
8 pleadings and the Complaint overall, that is exactly the fatal
9 flaw in the amended Complaint.

10 And this brings me to the second point, which is the
11 federal claims. The standard for a Computer Fraud Abuse Act
12 claim, number one, it's a statute that's aimed at the typical
13 consequences of hacking, and that's Van Buren vs. United
14 States, 141 S. Ct. 1648 (2021). Under 18 U.S.C. §1030(a)(4),
15 the Computer Fraud Abuse Act prohibits a Defendant from
16 knowingly and with intent to defraud accessing a protected
17 computer without authorization, and by exceeding whatever
18 authorization was granted, and furthering an intended fraud,
19 or obtaining something of value to access in the protected
20 computer. The Court's employ a {quote}, "gates-up, gates-down
21 equerry," which means that if the computer system was open
22 such that Defendant permitted access, then the gate was open
23 and there's no claim. If the gate was closed, such as in a
24 hacking situation, then the claim applies.

25 In addition, among other elements for such a claim, there

1 must be a loss related to a technological harm. So in Better
2 Holdco, Inc. vs. Beeline Loans, 2020 U.S. Dist. LEXIS 138908,
3 (S.D. July 26, 2021), the Court dismissed to see Computer
4 Fraud Abuse Act claim, because the Plaintiff only alleged that
5 the Defendant downloaded and copied data, but did not
6 otherwise allege that it lost service or access to data, or
7 that its systems were otherwise (indiscern.). A loss to one's
8 competitive advantage is not damage or loss covered by the
9 statute. Here the Computer Fraud Abuse Act claim should be
10 dismissed because, again, they just put -- lump together
11 conclusory group pleading, Paragraphs 178 through 186.
12 There's no factual predicate for the Don -- Defendants Don
13 Caroleo, or the entity (indiscern.) which he has ownership.
14 They just lump them together with no factual predicate.

15 The formula on those allegations are Giordano and Don
16 Caroleo, and then it's just -- they just list these generic,
17 broad, conclusory allegations that they unauthorized use of
18 Siteone's protected computer system. They cite essentially
19 the elements of a claim, but without facts. In addition, they
20 fail to just -- they fail to state a claim. I mean, they have
21 an allegation at Paragraph 179 that Don had an unauthorized
22 access to a live data stream. Number one, they know that's a
23 false allegation, because it was a live website that was open
24 to the public, but besides that flaw, they allege in the
25 amended Complaint that Siteone's {quote}, "firewall was still

1 permitting access," and that's at Paragraphs 104 to 105. So
2 this would be a gate-up scenario, and they cannot state a
3 Computer Fraud Abuse Act claim when the gate was up.

4 In addition, the amended Complaint alleges no loss
5 related to the technological harm, as in Better co. I'm
6 sorry, Better Holdco. It's the same situation. In addition,
7 they show nothing of value. In their -- the amended
8 Complaint, they rely on a declaration of David Shlaghack,
9 which is Document number 18, and that document really shows
10 the amount of today's sale of that particular locations, and
11 it has sales to date and the difference. This is a public
12 company that discloses this type of information. Nothing of
13 value whatsoever. So that's the Computer Fraud Abuse Act
14 claim, and that would fail as a matter of law even with the --
15 overlooking the conclusory group pleading, which is a fatal
16 flaw.

17 The Defend Trade Secrets Act also fatally flawed. As to
18 the Don Defendants, they -- this is really -- it's a
19 duplication of the breach of contract claims, but it's all
20 conclusory allegations. They just don't state a claim. In
21 addition, the Defend Trade Secrets Act, like New York, they
22 follow the Restatement six-factor test. The fatal flaw in
23 Siteone's pleading is they fail to identify any trade secret.
24 And if you search the amended Complaint for a trade secret,
25 you won't find it. You just get conclusory allegations that

1 Don had access to information relating to Siteone's highly
2 sensitive pricing and customer information. A conclusion
3 that's at Paragraph 146.

4 In the case Garvey vs. Face of Beauty, LLC, 2022 U.S.
5 Dist. LEXIS 171182 at pages 23 to 24, (S.D. September 21,
6 2022) case, the Court dismissed a Defend Trade Secrets claim
7 because the pricing information, while the Court acknowledge
8 may be a trade secret under certain circumstances, a {quote},
9 "Bare bones pleading that is bereft of non-conclusory
10 allegations that could demonstrate its consumer list pricing,
11 or other business information, or trade secrets," {close
12 quotes} without such -- without specific information and
13 pleading that's beyond bare bones, they can't assert such a
14 claim. Here Siteone's pleading has zero allegations that
15 information was secret. They go so far as to have -- at
16 Paragraph 94 they say there was a physical file that Nick
17 allegedly took, but they say, "There's no list as to what was
18 stored in the file. No way to inventory what was specifically
19 -- identify the documents it contained." That's hardly a
20 trade secret when they don't even know what's there, at
21 Paragraph 94.

22 Paragraphs 97 through 102, these are also, you know, just
23 the same group pleading issues and conclusory statements. 97
24 says, "It's entirely possible that Giordano and Don were still
25 monitoring security cameras." Entirely possible is not

1 plausible. Does not meet the standard. The allegation is,
2 "There's no way to identify what cameras are functioning or"
3 that's Paragraph 98, or 100, "To the extent that Don's {sic}
4 attempting to access footage." That's a quote. "To the
5 extent" is not an actual allegation either. The Defend Trade
6 Secrets Act requires more than that. On top of that, they
7 have to show that there are trade secrets, that there's
8 something that's not generally known, and as stated in Garvey,
9 which I cited before, they don't do that. Similarly, in My
10 Mavens, LLC vs. Grubhub, Inc., that's 2023 U.S. Dist. LEXIS
11 142204 (S.D. August 2023), the Court dismissed where it found
12 that the amended Complaint didn't -- does not allege that
13 Defendants misappropriated source code, or any other internal
14 processes of the software that are not readily identifiable,
15 nor obvious and easily duplicated, and that's at page 50.

16 The Complaint here fall far short in making anything
17 (indiscern.) these conclusory allegations. I will -- there
18 are generic references to shell companies. I'll let Co-
19 Defendant Counsel address that, but Your Honor, if you
20 determine that the two federal claims fail, then the entire
21 action should be dismissed and the Court would need not go
22 further. I would like to just, before I hand it over to Co-
23 Defendant Counsel, I want to point out the primary claims
24 against my client are breach of contract, and this Court spent
25 a lot of time analyzing one of the contracts. There are two

1 contracts at issue. One is the Asset Purchase Agreement, and
2 the other is the Coram Lease, which was not signed by anyone
3 in an individual capacity. It was just signed in a
4 representative capacity.

5 This Court spent a lot of time on that Coram Lease with
6 respect to the Preliminary Injunctions Motion, and in its
7 January 4 decision, this Court found that the plain meaning of
8 beneficiary {quote}, "Cannot possibly support" {close quotes}
9 Siteone's interpretation of that term, which includes any
10 person or entity that may otherwise be receiving a benefit
11 from the landlord. This Court explain {quote}, "Under this
12 formulation, a restrictive covenant would extend to the
13 landlord's landscaper, or snow remover service, or the utility
14 companies that provide service to the property if paid by the
15 landlord." Since this Court's conclusion is based on the
16 plain meaning, there is no ambiguity that would require
17 discovery beyond the four corners of the parties' intents.
18 Therefore, to the extent Siteone relies on beneficiaries with
19 respect to the Lease, I submit their claim is dead on arrival
20 as a matter of law.

21 That brings us to the second contract claims, which are
22 the claims based on the Asset Purchase Agreement. Now these
23 claims are just -- I got to go back to the impermissible group
24 pleading without repeating it, and conclusory, but there are a
25 couple of things I do want to point out. Number one is, the

1 allegations here against Don are basically to this effect.
2 They say that some people allegedly said that Don is starting
3 a nursery with Giordano, or some Siteone employee said that
4 they were going to work {quote}, "for Don and Giordano".
5 Those are at Paragraphs 22, 52, 59, 64, 69 of the Complaint, a
6 couple of other sections. I won't bore the Court with it, but
7 they rely on Mr. Salso, who says that he was approached by an
8 unidentified former Garden Department employee who advised
9 him. In turn, he had spoken to Giordano, who advised him
10 {quote}, "We are opening a nursery business." Now that
11 allegation itself does not even suggest who the we is, but
12 again, it's just a statement. That's Paragraph 69 of the
13 amended Complaint.

14 They have allegations that two Siteone customers, also
15 not identified, with whom Salso works regularly, told him that
16 Don Caroleo and Giordano were starting a new nursery. That's
17 Paragraph 75. They have a allegation that three employees
18 {quote}, "left Siteone in conjunction with Giordano's
19 termination," and told Siteone employee Pesaro that they
20 {quote}, "were going to work for Don Caroleo and Giordano."
21 That's Paragraph 103. Now it's somewhat elemental, but
22 someone saying that Don will be competing, that's an
23 allegation of a statement, but it's not an allegation of
24 competing. It fails to allege competing. It is fundamental
25 that (indiscern.) future plans are not statements of fact. I

1 cite the case Sabo vs. Delman, 3 N.Y.2nd 155, 160 (N.Y. Court
2 of Appeals, 1957) case. The Amended Complaint refers to
3 statement of someone indicating that someone else made a
4 statement of what they plan to do in the future. This does
5 not rise to the level of a statement of fact, it's not
6 plausible, and it does not satisfy basic pleading requirement.

7 In addition, it is well settled in this Circuit that if a
8 claim is based on unsubstantiated hearsay, the Court will
9 routinely dismiss (indiscern.) such claims. So in the case
10 Schwartz vs. HSBC, 2017 U.S. Dist. LEXIS 94019, the Court did
11 just that, dismissing -- I'm sorry. In the case Cummings vs.
12 The City of New York, 2020 U.S. Dist. LEXIS 31572 at 36 (S.D.
13 (indiscern.) 2020). The Court there dismissed discrimination
14 claims based on the {quote}, "unsubstantiated musings of
15 Plaintiff's unidentified colleague." {close quotes}. In Quirk
16 vs. Katz, 2022 U.S. Dist. LEXIS 165373 (S.D.N.Y. September 13,
17 2022), the Court dismissed claims that were based on someone's
18 testimony that a New York Post reporter told him that Chief
19 Judge Janet DiFiore made a claim that the Plaintiff was
20 racist. The claim against Judge DiFiore was dismissed. It
21 was based on this double hearsay -- unsubstantiated double
22 hearsay. Scott vs. Monk, that's 2022 U.S. Dist. LEXIS 130700,
23 in that case the Plaintiff (indiscern.) claimed that "they
24 overheard" {close quotes} a telephone conversation that the
25 Plaintiff's coworker said that the Plaintiff (indiscern.), and

1 the Court said that does not raise a plausible inference of
2 discrimination. The case Gertskis vs. New York City
3 Department of Health and Mental Hygiene, 2008 U.S. Dist. LEXIS
4 (S.C.N.Y. September 29, 2008) concluded unsubstantiated double
5 hearsay accusations are insufficient to raise a plausible
6 inference of discriminatory intent under §9(a) (indiscern.)
7 case.

8 Your Honor, we have here a slew -- this amended Complaint
9 is infected with improper conclusory allegations. This case
10 should not go forward, and I will allow -- and I could
11 (indiscern.) further on the other claims, but the tort claims
12 are essentially the same as the -- they're similar claims.
13 The unfair competition is basically based on misappropriation
14 of proprietary information, or trade secrets, and they don't
15 assert any trade secrets, so you know, that claim fails. The
16 other tort claims, the tortious interference with business
17 relations, the case Garvey, 2022 U.S. Dist. LEXIS 171182 at
18 1718, the Court there said, "General allegations of
19 interference with customers without allegations of any
20 specific business relationship that was interfered with must
21 be dismissed," and that's exactly what we have here for the
22 tortious interference with business relations. No specific
23 relationship is identified. It's just conclusions. They just
24 say, yeah, you interfered with customers. The tortious
25 interference with contract, similar flaw in that there are no

1 allegations to identify any contract or any breach by a third
2 party.

3 The allegation they have a -- this, you know, group
4 speak, Paragraph 219, Giordano, Don Caroleo and Vic Caroleo
5 induced one another to breach their non-competes. This is
6 another conclusion without facts to support it. It's just a
7 statement. You know, this is what affects the entirety of
8 their claims. The last claims against my client are aiding
9 and abetting breach of fiduciary duty, civil conspiracy. They
10 fail to establish the underlying claims, so those claims fail,
11 and they fail to plead anything which shows one activity by a
12 person acting in concert. It's insufficient as a matter of
13 law under Palmer vs. City of New York. That's 564 F. Supp. 3d
14 222 at 243. Your Honor, I submit that we should have the
15 opportunity to brief this, or this case should be dismissed on
16 this argument. There is just simply no claims that are
17 properly pled against our client, and they fail to plead them.
18 I yield to my Co-Defendant's Counsel. I thank you for your
19 time.

20 THE COURT: All right. Let me hear from the Co-
21 Defendant Counsel.

22 MS. COHEN: Good afternoon again, Your Honor. Julie
23 Cohen from Skadden Arps on behalf of the Vic Defendants, and
24 we would first of all -- I will try not to repeat what Mr.
25 Mule just elegantly said to the Court regarding the Don

1 Defendants, but we obviously agree that there is -- that the
2 Complaint should be dismissed for all of the reasons that Mr.
3 Mule has articulated, and would of course be happy to brief
4 the issue for the Court should the Court want additional
5 briefing on this matter where, you know, there really is sort
6 of -- and I admit to be new to the game here. I understand
7 the Court has been dealing with this lawsuit for quite some
8 time, and trying to pick apart the pieces of it where there
9 are 13 counts that have been alleged in very conclusory
10 fashion against nine different Defendants. So everything that
11 Mr. Mule said about the impermissible group pleading, we agree
12 that basically the Plaintiff has failed to even pass the basic
13 Rule 8 standard that would be required to plead a claim, let
14 alone the fact that there are certain claims here that sound
15 in fraud, so let alone the Rule 9(b) pleading with
16 particularity that would be required for those particular
17 claims.

18 And I think really when you step back and you look at the
19 allegations of the Complaint, you've got contract claims that
20 have been pled against those who are not parties to the
21 contract. You have claims where the basis of the claim is
22 that there has to be some sort of a trade secret that has been
23 alleged. Some sort of secret sauce, a formulaic Coca-Cola,
24 and that has not been alleged at all. Like, there's nothing
25 that has been alleged other than confidential -- potentially

1 confidential business information for a landscape supply
2 company, and there are individuals here that have been in the
3 business for a very long time that know this stuff. You know,
4 Vic Caroleo's been in the business for what, 50 years. He
5 understands the ins and the outs of the landscape supply
6 business. You've got claims of interfering with business, and
7 interfering with customer contract without a single allegation
8 of what contracts or customers have actually been interfered
9 with, and again, you've got these claims for fraud and breach
10 of fiduciary duty without even an attempt to plead the
11 heightened requirements of Rule 9(b).

12 Specifically with respect to Vic Caroleo, if you look at
13 the allegations in the Complaint, he's not a party, and the
14 Court has already been through this, to any restrictive
15 covenant, and otherwise he has just thrown in the allegation
16 not having been alleged to do anything other than operate an
17 allegedly competing business, but there's nothing to prevent
18 him from operating a nursery, and with respect to Mr.
19 Giordano, he's not a party to any restrictive covenant. He's
20 allowed to operate a business. There are claims with respect
21 to Mr. Giordano that have been pled based on a purported
22 misappropriation of certain information, such as computers and
23 laptops, but again, there is no underlying trade secret that
24 has been properly alleged here, and on that basis the
25 Plaintiffs have failed to properly plead any of those claims.

1 We would also join in emphasizing the fact that should
2 this Court look at the two federal claims that have been pled,
3 and on which the subject matter jurisdiction is based in this
4 Court, and decide that those claims have not been properly
5 pled, then the rest of these claims should also be -- we would
6 suggest should also be dismissed and the Court should decline
7 to exercise supplemental jurisdiction over those attendant
8 state law claims, but I will note that those claims, even if
9 on the merits when you look at each and every one of the state
10 law claims, for the reasons that I have just summarized, they
11 really don't pass muster.

12 Specifically I want to focus on, because I think my Co-
13 Counsel has done a nice job of walking through the various
14 claims that apply to all of the parties, including the Vic
15 Defendants, with respect to the counts that have been pled --
16 alleged against Mr. Giordano, Count 5 for conversion, in order
17 to plead a claim for conversion, Plaintiff must show a
18 possessory right or interest in the property, and dominion
19 over the property, or interference with it, and that's Zamora
20 v. FIT, 834 F. App'x 622 (2d Cir. 2020). First of all, the
21 Plaintiff does not adequately allege that Mr. Giordano took
22 dominion over any property against Plaintiff's right. The
23 Complaint contains only conclusory allegations that Giordano
24 took Siteone's computer, laptops, and wireless numbers and
25 security cameras, and it relies -- in order to make those

1 statements, all that the Complaint does is rely on the timing
2 of Mr. Giordano's termination. If you look at Paragraph 94 to
3 103, it doesn't allege that Mr. Giordano was the only one with
4 access to those items. It doesn't allege that anybody saw him
5 with those items. It basically only alleges that Mr. Giordano
6 was fired, and thereafter someone -- some items went missing.

7 Those conclusory allegations are not sufficient to
8 maintain a claim of conversion. In addition, under New York
9 law, when possession of property was initially lawful, which
10 it was here, everybody was working for The Garden Department,
11 you -- Plaintiff needs to plead in order to state a claim for
12 conversion that the demand for the return of the property was
13 made, or that Defendant wrongfully transferred or disposed of
14 it before a demand was made, and there's nowhere in the
15 Complaint any allegation that there was a demand for the
16 return of any property, and therefore we would say that the
17 conversion claim has not been properly pled and should be
18 dismissed, on top of the fact that the claim is duplicative of
19 Plaintiff's claim for breach of contract. We would then move
20 to fraud, which is Count 9 of the Complaint, that has been
21 pled against Mr. Giordano.

22 Again, claims of fraud are subject to a heightened
23 pleading standard under Rule 9(b). Plaintiff has not even
24 come close to meeting the requirements of Rule 9(b). They've
25 not alleged with any specificity, any material

1 misrepresentation. I suppose the closest they get on that
2 point is the allegation that Giordano misrepresented the
3 status of the desktop computer, but they don't explain why
4 that statement was material, or why that statement was
5 fraudulent, and in any event, Plaintiff could not have
6 adequately relied on that statement, since it has been pled in
7 the Complaint that the person who heard it found the statement
8 odd and went to investigate, and that's at Paragraph 63.

9 With respect to the alleged motive that's pled on the
10 fraud claim, basically the motive is that Mr. Giordano wanted
11 to go make money. Well, there's plenty of case law on the
12 point that financial gain is not sufficient to allege motive
13 on a fraud claim, Spinnato vs. Unity of Omaha Life Insurance,
14 322 F. Supp. 3d 377 at 401 in (E.D.N.Y. 2018), among other
15 cases, make that point. And I think with respect to the
16 unjust enrichment claim, which oftentimes, and I think here as
17 well, is sort of a throwaway claim that Plaintiffs put in
18 their Complaint. Just in case everything else doesn't work,
19 there's unjust enrichment, except that unjust enrichment here
20 really fails for the same reason that the conversion claim
21 failed in that Mr. Giordano, who this claim is alleged
22 against, is really not alleged to have actual possession of
23 anything for which he has been unjustly enriched. And so on
24 that basis alone, the unjust enrichment claim should be
25 dismissed. And I would also note that it should be dismissed

1 as duplicative of the breach of contract, unfair competition,
2 and fraud claims.

3 Count 11 is a Breach of Fiduciary Duty claim that has
4 been alleged against Mr. Giordano. Again, we would argue that
5 the Breach of Fiduciary Duty claim is premised on fraud here,
6 and accordingly, the heightened pleading standard of Rule 9(b)
7 should apply. To the extent that these allegations appear to
8 be based on the fact that Mr. Giordano's alleged to have a
9 competing business, or an allegedly competing business, as we
10 have already stated, he's allowed to compete. Mr. Giordano
11 and Vic Caroleo are not subject to any restrictive covenants,
12 and to the extent that they have pointed to allegations in the
13 Complaint that, you know, he, during the time he was working
14 at The Garden Department, went to some other site, well,
15 there's no other allegation that he was on the clock while he
16 was doing whatever he was doing when the investigator followed
17 him, or that he was using that time while he was working in
18 order to start some sort of competing business. Those
19 allegations just aren't there, and as the Court said in Mayo,
20 Lynch & Associate vs. Fine, (N.Y.A.D. 2d Department 1989),
21 it's fundamental that absent a restrictive covenant not to
22 compete, an employee is free to compete with his or her firm
23 or employer, unless trade secrets are involved or fraudulent
24 methods are employed, and neither of those things have been
25 pled here. All of the alleged statements on which Siteone

1 bases its breach of fiduciary duty claims are conclusory and
2 speculative at best, and so they should be dismissed. I think
3 with that, Your Honor, I would just reiterate the points that
4 my Co-Counsel made -- that Mr. Mule made, and suggest that if
5 my Co-Counsel wishes to chime in with anything, I will cede
6 the floor to him and otherwise would suggest to the Court that
7 we are willing to brief all of this for Your Honor, and
8 otherwise suggest that the Complaint should be dismissed in
9 its entirety.

10 THE COURT: Okay, Counsel, when you say you'd like
11 to brief this, I mean, is there anything left to say? And I'm
12 not being snarky. I mean, we covered a lot here, right?

13 MS. COHEN: We have covered a lot, and I think, Your
14 Honor, you would be able to make a decision based on the
15 arguments that we have made today. We certainly have covered
16 I think in sum and substance the arguments that we would make,
17 you know, in a 25-page Motion to Dismiss, but again, I'm
18 cognizant that there is a lot to unpack here in 13 different
19 claims with nine different Defendants, and so if it would be
20 helpful we would be obviously willing to do that.

21 THE COURT: Okay. All right. Well, let me hear
22 from Plaintiff's Counsel (indiscern.).

23 MR. ZABELL: Actually, Judge, this is Saul Zabell.
24 I just need to apologize to the Court. As much as I'd like to
25 say something, Miss Cohen, my colleague, has covered

1 everything, so I have nothing to add.

2 THE COURT: That's -- it's lovely to hear from you.

3 Thank you. That's great news. Perfect. So let's go to
4 Plaintiff then, yeah?

5 MR. MULRY: Oh. Good afternoon, Your Honor. Kevin
6 Mulry from Farrell Fritz for the Plaintiffs. And certainly we
7 would -- and certainly would like to brief the issues. I
8 don't think I was able to write down all the case citations
9 quick enough so that I could respond to them on the call right
10 now. The Court has spent a lot of time with this case, as has
11 --

12 THE COURT: Sorry, Mr. Mulry. Excuse me.

13 MR. MULRY: Yes?

14 THE COURT: This puzzles me. Yes. Your adversary
15 just said that they think they covered everything. I
16 indicated I was not being snarky when I said we've covered a
17 great deal of material. I would think it was in your client's
18 interest to move things forward, so if you want to do briefs,
19 I'll do that, but it's going (indiscern.) substantial.

20 MR. MULRY: Well, Your Honor, let me give you my
21 presentation then. The --

22 THE COURT: I'd love to (indiscern.).

23 MR. MULRY: -- The Court looked at in this case so
24 far was one very important issue, but also one very narrow
25 issue presented by the case, and that was the issue with

1 respect to the Coram Lease. Now just looking at the Coram
2 Lease, there is a significant restrictive Lease issue --
3 restrictive covenant issue with respect to the Coram Leash
4 {sic}, and there's a lot of briefing, and both you and
5 Magistrate Judge Tiscione have given opinions on the meaning
6 of how should beneficiary be looked at in the context of the
7 Coram Lease. Those issues were all addressed by the Court on
8 a Preliminary Injunction application, and we understand the
9 Court held that there was not a sufficient showing for a
10 Preliminary Injunction. However, that claim should go
11 forward, and there are certainly issues of fact with respect
12 to the Coram Lease. In Judge Tiscione's opinion, he
13 specifically recognize that it was unclear whether rental
14 payments -- where the rental payments went, whether Vic took a
15 salary for the CEO position, and whether dividends were paid
16 to shareholders and members of the multiple LLCs that have
17 involvement in the Coram Lease. That there could be a veil
18 piercing argument that could be advanced.

19 Magistrate Judge Tiscione also recognize that Siteone
20 continues to be harmed by the presence of unexpected
21 competition in the landscaping business, and were Siteone able
22 to show that any of the individual Defendants were personally
23 bound by the Lease terms, then the balance of equities and the
24 public interest would surely weigh in favor of enjoining
25 further competition. Those issues are all going to be subject

1 to factual questions, and should go to Discovery. There are
2 sufficient allegations in the Complaint, amended Complaint
3 with respect to those issues. With respect to the other
4 claims, the federal claims as well as the state claims, I
5 would take a step back and let's look at what happened here,
6 because there are specific allegations as to the specific
7 individual Defendant here that certainly are sufficient for
8 the pleading, and will raise issues of fact that will have to
9 be understood through Discovery. Don is terminated on October
10 19th. The next day a computer technician is called into the
11 business and said, "Someone has been trying to get information
12 onto a flash drive from the bookkeeper's laptop computer."

13 That computer is now missing. No one can locate that.
14 In January, Siteone employees -- and this is the subject of
15 both allegations in the amended Complaint, as well as
16 declarations from numerous fact witnesses through the
17 Preliminary Injunction briefing. Siteone employees notice
18 that Giordano's computer was missing from his desk. He said
19 he threw it in the dumpster. It wasn't there. Someone looked
20 for that. There was an allegation in the briefing that a
21 Siteone IT supervisor told him he could get rid of the
22 computer. It's completely implausible that a Siteone IT
23 supervisor would say, just throw out a business computer. No
24 one just throws a computer in a dumpster, particularly a
25 computer with confidential business information. Certainly in

1 that same month, Giordano told a former employee that he and
2 others were opening a nursery, and several current employees
3 of Siteone were seen working at the Middle Island location on
4 company time, where originally the nursery was going to be
5 opened.

6 Know on February 20th Mr. Giordano was terminated. While
7 he was being terminated, he was wiping his company cell phone
8 by resetting it to factory settings. That was a business cell
9 phone that he used for business with business information.
10 The very next day confidential business information was
11 missing from an office file cabinet. That same week the Coram
12 security monitor and DVR recording system are missing. These
13 all together -- and there are numerous facts that are in the
14 briefing that was before both the Magistrate Judge and Your
15 Honor, show that there is sufficient evidence for this case to
16 go forward, and that there will be issues of fact, and whether
17 the Court rules on the letters that have been submitted and
18 the whole record to deny a Motion to Dismiss, or if you're on
19 a once briefing the parties can all do that, but certainly
20 we're willing to do that.

21 With respect to trade secrets, the allegations in the
22 Complaint are that the information that is now missing under
23 very suspicious circumstances or was information that is
24 information that a competitor used for pricing and bidding
25 strategies, customers, what Siteone sells to those customers.

The Court - Finding

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1 There were references to the sales data. Certainly Mr. Don
2 Caroleo set up a app that had a website, and I think there's
3 arguments that this was a public website. This is not a
4 website that's on The Garden Department website so that
5 everybody can look in and see how much in sales did the store
6 do today, and let's compare that historically to last year,
7 and let's look month-to-month, and look year-to-year. That,
8 with respect to sales data, plus other information, did give a
9 competitive advantage, and we say that the allegations of the
10 amended Complaint fully support the claims under the Trade
11 Secrets Act, and the Computer Fraud Abuse Act. I'll stop
12 there. If the Court has specific questions, I'm happy to
13 respond to those.

14 THE COURT: All right. Is that it, Mr. Mulry? Are
15 you done?

16 MR. MULRY: Yes, Your Honor.

17 THE COURT: Excellent. All right. Well, I've heard
18 enough, and what I'll say is this. I think Counsel did a fine
19 job today, an excruciatingly fine job. I have every detail of
20 the argument on the record. More importantly, as I've been
21 reminded, and of course I recall, I've seen extensive briefing
22 on this case in the context of the Preliminary Injunction
23 proceedings, and as such I believe I'm in any position to rule
24 on this without further delay to this case, which has already
25 been substantially delayed in a sense, and I don't think

1 that's anyone's fault, but it has just taken a while to get
2 our arms around these various issues, so I'm going to deem the
3 Motions made, and I'm going to decide them now. Will not be
4 issuing a written decision. The decision will be on the
5 record, but I will say that as part of this decision, I've
6 incorporated everything that was put forth in the parties'
7 letter briefs to the Court, which were quite good and
8 thorough, as well as the argument today, which were detailed
9 down to LEXIS citations, so we have quite an impressive
10 record.

11 With that said, of course which before the Court is a Rule
12 12 Motion to Dismiss the Complaint on the grounds that it
13 fails to state a cause of action. I will not belabor the
14 record with the standard here, because you all know it quite
15 so very well. The answer of course is that taking all drawn
16 inferences and (indiscern.) non-movement here the Plaintiff,
17 and question me, and assuming the allegations to be true for
18 these purposes, are there sufficient allegations to go forward
19 with claims that satisfy both Rule 8, as well as in certain
20 instances in this case there are elements of 9(b), but it's
21 mainly Rule 8. Either way. But Defendant claims that the
22 allegations are insufficient. Of course the Court had issued
23 several decisions on this case, and in those Petitions the
24 Plaintiff did not prevail in getting Preliminary Injunctive
25 Relief. Of course (indiscern.) is adjudged by a completely

1 different standard. The standard there is that it's quite
2 extraordinary, because Preliminary Injunctions involve
3 extraordinary efforts and extraordinary exercise of power by
4 the Court.

5 This is a different situation. The question is, does
6 this Complaint -- it's a 55-page Complaint here -- satisfy
7 Rule 8(b) notice in absolute (indiscern.) the Rule 8, and I
8 would say that in the instances where 9(b) an analysis is
9 required, it satisfies 9(b) as well. Therefore, I'm deeming
10 the Motions made and denied. So I'm denying the Motions to
11 Dismiss, and the case can move forward. Now let's get to
12 that, because that to me is the most important thing. I would
13 like to -- I will leave to Magistrate Tiscione done a fine job
14 in this case, the management of the Discovery, but I do think
15 that this has to be put on a rapid path in Discovery. I think
16 we have to get this to completion rapidly, because it's an
17 important ongoing business concern. So with that in mind, I'd
18 love to hear the parties' input as to what you think a
19 reasonable Discovery schedule would look like. Let me start
20 with the Plaintiff. Mr. Mulry, what do you think in terms of
21 how long should it take to go from this point where we're
22 denying Motion to Dismiss, to the point where we're ready for
23 the next step, (indiscern.) or the Summary Judgment, or trial,
24 or whatever?

25 MR. MULRY: Well, Judge, one thing I'll preface that

1 with is the parties do have a call scheduled for tomorrow,
2 meet and confer with respect to Discovery and a Discovery
3 schedule. I think --

4 THE COURT: Okay.

5 MR. MULRY: -- what -- and certainly we're happy to
6 talk about it with you today. I think our intent was to
7 discuss the issue and present a proposed schedule to Judge
8 Tiscione, but --

9 THE COURT: Okay.

10 MR. MULRY: -- our view would be that Discovery
11 should certainly proceed as quickly as possible. We think
12 certain things can be done in the short-term. We would look
13 to likely try to get this complete, if we could, in something
14 like four months so that it could be presented to the Court.
15 I think there are some non-party Depositions that could be
16 taken early, because certainly the parties are going to want
17 to exchange paper Discovery, and there'll be some lead time
18 that will be needed for that. But there are certainly some
19 non-parties who were involved in the events where there are
20 not going to be a lot of documents, and so that's something we
21 would propose. With respect to the issue on beneficiaries,
22 certainly the issue of -- and again the, as I'm sure Your
23 Honor recalls, Siteone has been paying rental payments to the
24 owner of the Coram property, and the issue of where do those
25 rentals go, who is a beneficiary, where do the proceeds go,

1 that's something that's very relevant. With respect to the
2 issue of who is a beneficiary, and another very -- an issue
3 that we think is something that should be discussed and
4 address sooner rather than later with respect to Discovery is
5 the forensic issues as to the computer access and the
6 computers that are missing, and those other issues related to
7 that as alleged in the Complaint.

8 THE COURT: Okay. Who would like to speak for
9 Defendants on that question?

10 MS. COHEN: Your Honor, it's Julie Cohen. I'm from
11 Skadden Arps on behalf of the Vic Defendants. (Indiscern.)
12 Like the Plaintiff suggested, we do have a meet and confer set
13 for tomorrow. We're happy to confer and try and come up with a
14 reasonable schedule between the parties, and submit something
15 to the Magistrate in terms of what we expect for a schedule
16 going forward. I think we need some time to discuss amongst
17 ourselves. I think that the schedule they have in mind is
18 much shorter than I was necessarily thinking, given all of the
19 parties here, and I think we may take issue with the request
20 for a {quote} {unquote} "any sort of {quote} {unquote}
21 forensic type Discovery" based on the allegations that have
22 been pled. Certainly we'll just need to discuss the idea of
23 understanding the parties may want to take some non-party
24 Depositions and whatnot, so I think, you know, a reasonable
25 next step would be for the parties to confer -- have a meet

1 and confer on this, and potentially submit something to the
2 Magistrate for consideration, whether that be, you know, one
3 Proposed Order, or competing kind of Proposed Order. Then we
4 can figure out how to make the case move forward in light of
5 Your Honor's decision.

6 THE COURT: Okay. Would Co-Defendant's Counsel like
7 to speak?

8 MR. MULE: So I --

9 MR. ZABELL: Yes, Your Honor. Michael, go ahead.

10 MR. MULE: Saul.

11 MR. ZABELL: No. No. Go ahead, Mike. It's fine.

12 MR. MULE: Yeah. I just join in what was said, and
13 I think that once we have our meet and confer we could more
14 intelligently come up with a plan.

15 THE COURT: Okay. Mr. Zabell?

16 MR. ZABELL: (indiscern.) I don't have anything
17 further to add, Judge. Thank you.

18 THE COURT: It's a surprising day, Mr. Zabell.

19 MR. ZABELL: I do my best to be surprising, Judge.

20 THE COURT: Always, sir. Always. It's always a
21 pleasure. All right. So I will leave it at that. The
22 parties are going to meet and confer tomorrow. I couldn't ask
23 for it any sooner. Well, you could do it today, but
24 tomorrow's good enough. But I will say I do think the case
25 should move faster rather than slower, given the nature of the

1 concerns, I think, and we should get this resolved one way or
2 the other soon. So I'll leave you with that. Anything else
3 from anybody else before we call it a day?

4 MR. MULRY: No, Your Honor, on behalf of Plaintiffs.

5 MS. COHEN: No, Your Honor. On behalf of the Vic
6 Defendants, thank you.

7 MR. MULE: No, Your Honor, on behalf of the Don
8 Defendants. Thank you.

9 THE COURT: All right. In that case, thank you all
10 for your work. We are adjourned.

11 MR. ZABELL: Thank you, Judge.

12 (Court adjourned)

13

14 CERTIFICATION

15 I, Lewis Parham, certify that the foregoing is a correct
16 transcript from the electronic sound recording of the
17 proceedings in the above-entitled matter.

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- 19 -

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Lewis Parham

3/29/24

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Signature of Transcriber